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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-190

ELI LILLY AND COMPANY,

Petitioner,

vs.

ELMER B. STAATS, COMPTROLLER GENERAL OF THE UNITED STATES, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION FOR LEAVE TO FILE AND BRIEF AMICUS CURIAE OF ABBOTT LABORATORIES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

RICHARD S. RHODES,
WILLIAM VAN HAGEY,
8500 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Abbott Laboratories.

Of Counsel:
CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS, LTD.,
8500 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606.
GARY A. BUELOW,
Abbott Laboratories,
Abbott Park,
North Chicago, Illinois 60064.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

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INTEREST OF THE AMICUS CURIAE.

Like Eli Lilly & Co., Abbott Laboratories is one of six companies which voluntarily co-operated with the Comptroller General by furnishing information during the first phase of a study of the pharmaceutical industry, which was initiated at the behest of the Subcommittee on Monopoly of the Senate Select Committee on Small Business. When the General Accounting Office ["GAO"] subsequently sought access to additional material, the

companies deemed it to be confidential and denied such access. To facilitate the further gathering of information which he considered necessary for the research study sought by Congress, the Comptroller General sent formal demand letters to each of the six firms, demanding access to company records which he contended were "directly pertinent to" certain government contracts for the sale of catalog items by each of the firms. These demands were alleged to be beyond the Comptroller General's statutory or contractual authority in five separate lawsuits, including the instant action and the case of *United States* v. *Abbott Laboratories,* now pending in the United States District Court for the Northern District of Illinois (Civil No. 75 C 2345).

On April 24, 1978, Judge Crowley granted summary judgment in favor of the government against Abbott Laboratories, based entirely upon the majority opinion announced in this case by the Court of Appeals for the Seventh Circuit; on July 25, 1978, Abbott's motion to alter or amend the judgment was denied. Abbott Laboratories intends to appeal to the Court of Appeals, contending, *inter alia,* that the *Lilly* opinion does not dispose of all the issues presented in the *Abbott Laboratories* case. However, a number of substantial legal questions are common to the two cases, including the effect of the Comptroller General's purpose in pursuing his demands for access, as well as the lawfulness of their scope, and the majority opinion in *Lilly* resolves these questions adversely to Abbott Laboratories' interests.

The Seventh Circuit decision in *Lilly* is a serious misstatement of the law pertaining to government contracts, which will permit unwarranted intrusion upon the private papers of contractors and therefore impede the ability of the government to procure economically the goods and services which it must purchase. In addition to those points presented in Lilly's petition for writ of certiorari, Abbott respectfully urges this Court (i) to consider the proposition that governmental demands for private

information must be judged by their primary purpose and (ii) to direct the trial court to weigh the consequences of awarding or denying the equitable relief sought. Accordingly, Abbott seeks leave to file this brief as *amicus curiae* in support of Lilly's petition.

ARGUMENT.

1. The Decision Below Conflicts with the Decision of the Fifth Circuit That the Lawfulness of a Governmental Demand for Information Must Be Judged by Its Primary Purpose.

The opinion below holds that the presence of "at least one legitimate purpose" validates an otherwise improper governmental demand for access to private papers. *Eli Lilly & Co.* v. *Staats, et al.,* 574 F. 2d 904, 910 (7th Cir. 1978). In so holding, the Seventh Circuit is in direct conflict with the Fifth Circuit decision in *United States* v. *Humble Oil & Refining Co.,* 488 F. 2d 953 (5th Cir. 1974), *vacated* 421 U. S. 943 (1975), *on remand* 518 F. 2d 747 (1975). Although Lilly has cited the *Humble Oil* case in its petition with respect to the propriety of the Comptroller General's demand, it has not specifically called to the Court's attention an important part of the holding which is relevant here. The Fifth Circuit held that the possibility of an incidental, lawful purpose will not excuse an unauthorized demand for information, but it is the *primary purpose* of the inquiry which determines its legality:

> "The information sought did not relate to a specific, extraordinary transaction as in *Bisceglia.* Nor were there any factually demonstrable grounds to suggest the likelihood of unpaid taxes. The summons was not issued to facilitate any ongoing investigation. Rather, the information was sought from Humble to expedite research on an IRS project concerning compliance with the lease restoration requirements of the Internal Revenue Code. An adjustment of tax liabilities may have incidentally resulted from the project, but the *primary purpose* of the project was research." 518 F. 2d at 748. (Emphasis added.)

There is no doubt that the *primary purpose* of the Comptroller General's demands in these cases has been, likewise, to conduct a research project. *E.g.*, Proposed Orders in *Lilly* and *Abbott*, p. 4. Abbott respectfully urges that this Court not let stand a novel and ill-considered rule which would encourage a government agency to contrive to gain access to corporate records when, in spite of possibly legitimate, incidental purposes, its admitted primary purpose for examination of such records is not authorized by the narrow statute upon which it relies.

2. The Decision Below Fails to Balance the Needs of the Government Against the Consequences of Awarding the Relief Sought.

It is well settled that, in awarding an equitable remedy, a court must weigh the needs of the plaintiff against the consequences to the defendant which would result from the relief sought. *E.g.*, *Eccles* v. *Peoples Bank of Lakewood Village, Cal.*, 333 U. S. 426 (1948). The need for such relief must be clear, not remote or speculative. *Id.* at 431. Abbott respectfully submits that the examination of books and records demanded by the government in these cases will result in substantial injury to Abbott, as well as to Lilly and the other firms involved, while yielding little, if any, benefit to the Comptroller General.

The scope of the "audit" or examination sought by the Comptroller General shows the extent to which the government seeks to intrude. The uncontroverted facts of record in the *Abbott* case are that Abbott's books and records for the two years in controversy contain over ten million documents located in the United States and numerous other documents, mostly in foreign languages and currencies, in forty-five other countries.* The proposed audit in the United States alone would take many months and would necessitate the diversion of Abbott executive,

* The facts describing the nature and impact of the proposed audit upon Abbott are stated in the affidavits of Lester E. Hammar and Robert F. Morris, filed, under Rule 56, in United States v. Abbott Laboratories.

accounting, legal, and staff personnel to supply documents, respond to GAO inquiries, and monitor the proceedings. As the GAO has described its audit process: ". . . the work proceed(s) very slowly because of the time-consuming processes of working through liaisons and setting up necessary meetings with company representatives." GAO Memorandum, August 27, 1975.

The benefits of the GAO's proposed "industry study" are remote and speculative; the government has never pleaded facts which would demonstrate any injury if its demands were not enforced. The "study" was not designed to examine statistically representative firms or products, but rather was capriciously instituted against the six firms which were most visible because they had voluntarily offered their assistance to the government. The principal objective of the "study" is to determine individual product costs, even though there are no generally accepted accounting principles which permit allocation of all costs to individual products. Abbott, itself, makes no attempt to fully-allocate costs to its individual products. The Comptroller General has acknowledged the arbitrariness of attempting to allocate costs to specific parts of a diversified business.

In contrast to the chimerical aims of the contemplated "study", the harm to the subject pharmaceutical firms is real and subject to some measure of ascertainment. Abbott has estimated that its direct costs in responding to the proposed audit would be in excess of $10,000 per month, plus the [illegible] costs attributable to disruption of normal business operations. Abbott's forecast of the audit's duration is a *minimum* of twelve months; if the GAO were permitted to peruse Abbott's papers for just sixteen months, fully one half of the entire revenue (not profit, but revenue) received by Abbott under the four contracts being "audited", $327,783, would be expended in direct costs before the task was completed. In short, the government now claims the unconscionable right to come in after a contract has been performed and require the contractor to spend such a disproportionate amount of money in submission to a "contract

audit" (even though it is conceded that no impropriety is suspected), that the value of the underlying contract to the contractor is negated!

Moreover, substantial and irreparable injury would result to the firms involved if the information obtained by the GAO were publicly disclosed. Such data would reveal decision-making methodology, business strategy, including marketing and pricing practices, and other proprietary information, which would give their competitors substantial, unfair advantages.

While the probability of disclosure remains a disputed question of fact, the possibility of that occurrence is hardly remote; the order proposed herein by the government explicitly contemplates disclosure of confidential data by the GAO to the Congress. Whatever the intention of the GAO may be with regard to disclosure of this data to the public, the GAO has recognized the intention of Congress:

> "[Senate Subcommittee Staff Economist] said that he would much prefer receiving the cost and pricing data on an individual product and company basis. He said that he felt that such data should be made public. . . ." GAO Memorandum, August 13, 1971.
>
> "[Senate Subcommittee Staff Economist] would prefer to press for obtaining such [cost] records without any strings attached so that the high profits could be publicized by product and firm." GAO Memorandum, October 15, 1971.
>
> "[Chairman of the Senate Subcommittee and its Staff Economist] feel that we should press our right of access to the cost records—through the courts if necessary—with a view to using the data in any way we see fit, and more particularly in any way the Small Business Subcommittee wishes to have the information." GAO Memorandum, October, 1971.

These memoranda and the proposed order demonstrate that this highly sensitive material, delivered to the Congress by the GAO, *will* be intentionally disclosed to all, including competing pharmaceutical firms.

CONCLUSION.

If the majority opinion of the Court of Appeals here is allowed to stand, all prospective government contractors will be on notice that they may be subjected to broad government intrusions into their company files for reasons unrelated to the supply contracts which would provide the excuse for such invasions.

For the foregoing reasons and for those advanced by Eli Lilly & Co., Abbott Laboratories respectfully urges that Lilly's petition for writ of certiorari herein be allowed.

Respectfully submitted,

RICHARD S. RHODES,

WILLIAM VAN HAGEY,
8500 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606,
Attorneys for Abbott Laboratories.

Of Counsel:
CHADWELL, KAYSER, RUGGLES,
McGEE & HASTINGS, LTD.,
8500 Sears Tower,
233 South Wacker Drive,
Chicago, Illinois 60606.
GARY A. BUELOW,
Abbott Laboratories,
Abbott Park,
North Chicago, Illinois 60064.

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